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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1558

NATIONAL HOCKEY LEAGUE, *et al., Petitioners,*

v.

METROPOLITAN HOCKEY CLUB, INC.,
and GOLDEN BLADES HOCKEY, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for all Petitioners except National Hockey League

HARRY L. SHNIDERMAN
BINGHAM B. LEVERICH
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000
Attorneys for Petitioner National Hockey League

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement	3
Introductory	3
Background Facts	4
Basis for Dismissal of the Complaint	6
The Reversal of the Dismissal Order	13
Reasons for Granting the Writ	16
Conclusion	23

TABLE OF AUTHORITIES

CASES:

Diapulse Corp. v. *Curtis Publishing Co.*, 374 F.2d 442 (2d Cir. 1967) 13, 16

Kenney v. *California Tanker Co.*, 381 F.2d 775 (3rd Cir. 1967) 19

Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 7, 17, 20, 21

Marshall v. *Sielaff*, 492 F.2d 917 (3rd Cir. 1974) 19

Societe Internationale v. *Rogers*, 357 U.S. 197 (1958) 2, 16, 17, 19, 20

Spering v. *Texas Butadiene & Chemical Corp.*, 434 F.2d 677 (3rd Cir. 1970) 19, 21

Page

STATUTES AND RULES:

28 U.S.C. § 1254(1) 2

Rule 33, Fed. R. Civ. P. 6

Rule 37, Fed. R. Civ. P. 2, 3, 6, 8, 11, 16, 18, 20, 21, 22

Rule 41(b), Fed. R. Civ. P. 17, 21, 22

MISCELLANEOUS:

4A Moore, *Federal Practice*, § 37.01[8] 18

8 Wright, *Federal Practice & Procedure* 756 20

Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480 (1958) 18, 19

1959 Duke L. J. 278 .....19, 21

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The National Hockey League and those of its member clubs listed in the footnote[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unreported. The opinion of the district court (App.

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[1] Atlanta Hockey, Inc., Boston Professional Hockey Association, Inc., Niagara Frontier Hockey Corp., Chicago Blackhawk Hockey Team, Inc., Detroit Hockey Club, Inc., California Sports Inc., Northstar Financial Corp., Le Club de Hockey Canadien, Inc., Nassau Sports Limited, Madison Square Garden Center, Inc., Seals Management Partners, Philadelphia Hockey Club, Inc., Pittsburgh Penguins, Inc., Maple Leaf Gardens, Limited, Northwest Sports Enterprises Ltd., and Missouri Arena Corp.

E) is reported at 63 F.R.D. 641. Other opinions by the district court in this case (Apps. F and G) are reported at 351 F. Supp. 462 and 371 F. Supp. 742.

JURISDICTION

The judgment of the court of appeals (App. B) was entered February 23, 1976. A petition for rehearing was denied on March 18, 1976. App. C. By order of April 1, 1976 (App. D), the court of appeals stayed its mandate until April 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether under Fed. R. Civ. P. 37(b)(2)(C) and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), a district court has discretion to dismiss a complaint for violations of discovery orders where the violations, though resulting from gross negligence, were not provably intentional.

2. Whether the scope of review of a district court's Rule 37 dismissal of a complaint is broad enough to permit an appellate court to make, and rely upon, its own findings of fact instead of reviewing the district court's findings under the "clearly erroneous" standard.

3. Whether under Fed. R. Civ. P. 37(b)(2)(C) and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), a district court may, in determining whether or not to dismiss a complaint for violations of discovery orders, consider the entire previous history of plaintiff's discovery misconduct in addition to the final violation that occasioned the motion to dismiss.

4. Whether, for purposes of the discovery sanctions under Fed. R. Civ. P. 37(b)(2)(C), a party may be charged with the discovery misconduct of its counsel.

STATUTORY PROVISIONS INVOLVED

No statutes are involved. Rule 37 of the Federal Rules of Civil Procedure is set out in Appendix H.

STATEMENT

Introductory

The case below was a complex of antitrust litigation by the World Hockey Association ("WHA") and its member clubs against the National Hockey League ("NHL") and its member clubs. On February 2, 1973, the defendants began seeking discovery. Seventeen months later, as detailed in Judge Higginbotham's findings (App. E, pp. 23a-47a), the plaintiffs had, in substantial part, still not complied with their obligation to supply it and the court dismissed the complaint.

The dismissal motion granted by Judge Higginbotham was the defendants' second such motion. The first had been denied in the exercise of his discretion to impose a lesser sanction, even though, as he concluded, the motion was well-founded and could have supported a dismissal. In ordering the dismissal on defendants' second motion, Judge Higginbotham stated:

> "If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." App. E, p. 51a.

On February 23, 1976, the Court of Appeals for the Third Circuit reversed that dismissal for abuse of discretion and on March 18, 1976, denied rehearing.

Background Facts

One of the original plaintiffs was WHA's New York franchise holder, Metropolitan Hockey Club, Inc., a corporation organized and owned by two New Jersey trial lawyers. By November 16, 1972, Metropolitan, after meeting its first two payrolls, was in financial trouble and the WHA took over its operations for the rest of the first season. (R. 2898).[2] The next spring, in preparation for the 1973 season, Metropolitan's franchise and player contracts were transferred to Golden Blades Hockey, Inc., a corporation newly organized by Golenbock & Barell, a New York law firm. The two lawyers who had organized Metropolitan received through their corporation about 20 percent of the shares of Golden Blades. A block of Golden Blades stock went to Golenbock & Barell. The balance was held partly by Golenbock & Barell clients and partly by other investors. One of the partners in Golenbock & Barell became an officer and a member of the board and executive committee of the company. By the beginning of the 1973 season, Golden Blades collapsed. Again the franchise was taken over by WHA and this time it expired. (R. 1256, 1317-o, 1348-67, 1788, 1813, 2013, 2156, 2236, 2505-13, 2715-16).

Among the assets Golden Blades took over in the spring of 1973 was Metropolitan's interest in the

[2] "R." references are to the pages of the Joint Appendix printed for use in the Court of Appeals.

antitrust litigation. In addition, Golden Blades became a plaintiff in its own name in one of the later suits consolidated in the litigaton. (R. 1256, 1788, 2898). As parties to the litigation the two corporations are hereinafter referred to collectively as "M-GB."

In the latter half of 1973, counsel for both sides, conscious of the March 18, 1974 trial date fixed by the court, worked strenuously to effect a settlement of the litigation and by January of 1974 had agreed upon a disposition. M-GB announced, however, that it would not participate in the settlement. Accordingly, on February 19, 1974, a consent decree was entered terminating the litigation as to all plaintiffs other than M-GB. (R. 1263). Golenbock & Barell, involved in the litigation since the spring of 1973 as general counsel for M-GB, now took over the case as trial counsel, replacing Mr. Harold E. Kohn of Philadelphia. (R. 1317-o, 2899-2900).

A year before, on February 2, 1973, the defendants had commenced their trial preparation by propounding a set of interrogatories. By reason of M-GB's violations of the discovery rules, as hereinafter described, it had still not answered those interrogatories when all the other parties terminated the litigation. At a pretrial session on February 20, 1974, the day after entry of the consent decree, the court informed counsel for both sides that the March 18 trial date was still firm. NHL counsel, at that session, demanded of Golenbock & Barell the earliest possible answers to the then year-old interrogatories. (R. 1550-56). As will hereinafter appear, the next three months were occupied with M-GB violations of court orders, postponements of deadlines, a motion to compel answers

and two Rule 37 motions to dismiss the complaint, the second of which was ultimately granted on July 3, 1974, after three clear admonitions by the court that repetition of M-GB's noncompliance with orders would produce a dismissal.

Basis for Dismissal of the Complaint

1. The interrogatories, consisting of 120 separately numbered questions, were served on M-GB and the other WHA parties on February 2, 1973. Rule 33(a), Fed. R. Civ. P., required answers by March 5, but the plaintiffs ignored that requirement. (R. 530, 539).

2. Instead, on March 15, 1973, plaintiffs filed an amended complaint. The defendants retailored their interrogatories to dovetail to the paragraph numbers of the new complaint and resubmitted them on March 30, 1973. The new due date for answers was April 30, 1973. That due date as well was ignored. (R. 456, 576, 593, 705-06).

3. Instead, on May 4, 1973, plaintiffs made an untimely motion to extend their time to answer until May 25. Over defendants' objections, the court ordered that objections be filed by May 14 and answers by May 25. (R. 737, 780-81). M-GB violated both parts of this order:

(a) Plaintiffs did not file their objections until May 15 and then they consisted of a clearly insufficient shotgun attack on all the interrogatories as sweeping "too broadly" and being "unduly burdensome, expensive and inefficient." (R. 783).

(b) M-GB's answers to the interrogatories consisted of *a single unsworn and unsigned sentence.* (R. 875). The district court held:

> "By the most liberal construction imaginable of the discovery provisions of the Federal Rules of Civil Procedure Metropolitan's 'answer' after four months fell drastically short of any minimal good faith compliance."[3] App. E, p. 29a.

M-GB's argument, as to its patently contumacious answer, is to lay the responsibility for it upon its then trial counsel, Mr. Kohn. The record shows, however, that Mr. Kohn filed the insufficient answer because M-GB, notwithstanding his pleas, failed to supply him the information needed for proper answers, and, indeed, he warned M-GB: "You better get something filed. Let's hope this will hold the line for you. Otherwise you are going to be out on your you know what."[4] (R. 1734, 1526).

4. On June 7, 1973, the court urged the parties to attempt to agree upon a disposition of all pending discovery problems and then report back to the court.

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[3] The Third Circuit, while grudgingly conceding that M-GB's answer "should have been more specific as required by Fed. R. Civ. P. 33(c)", found it to be error for the district court to consider any of M-GB's misconduct prior to February 19, 1974. App. A, p. 12a.

[4] Notwithstanding that the record thus shows M-GB's clear responsibility, the Third Circuit, as one of its reasons for excluding from consideration all events before February 19, 1974, stated: "The final responsibility for answering interrogatories was with lead counsel and in fact the Kohn firm did prepare many answers itself. Any delays or deficiencies in the answers caused by Kohn should not be attributed to M-GB's present counsel." App. A, p. 14a. The Third Circuit seems to miss the point. Whether or not Kohn's misconduct is attributable to M-GB's present counsel, it is attributable to M-GB itself, as this Court made plain in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Moreover, since Golenbock & Barell own stock in their client and have a partner on its board and as its secretary, it would seem pointless to try to distinguish between attorney and client.

On June 25, plaintiffs' counsel reported to the court that considerable progress had been made: "the WHA would provide relatively full discovery with respect to the NHL interrogatories and document requests the NHL considers critical." (R. 1200-o). Having thus resolved the most significant of the pretrial problems, the parties then turned their attention to the then ongoing attempts to settle the litigation, always bearing in mind, however, that the trial date had been fixed for March 18, 1974. (R. 458, 1274).

5. Immediately after entry of the consent decree on February 19, 1974, settling the litigation as to all plaintiffs other than M-GB, the defendants, looking toward the imminent trial date, made a demand for answers to their interrogatories. (R. 1555-56). Golenbock & Barell, now appearing as trial counsel for M-GB, advised the court: "We have the information, we will answer them." (R. 1743). Accordingly, in a pretrial order on February 26, 1974, the court fixed March 11, a date agreed to by Golenbock & Barell, as the due date for M-GB's answers.[5] (R. 1925). On March 11, however, M-GB filed neither answers nor a motion for an extension of time. Instead, it wrote a letter to the court, a copy of which was not delivered to defendants' counsel until March 12, requesting an extension of the March 11 due date. (R. 2155).

6. M-GB's violation of the February 26 pretrial order occasioned the defendants' first Rule 37 motion to dismiss the complaint. The court denied the motion, gave M-GB the extension of time and again ex-

[5] By the same order, the court, at M-GB's request, extended the trial date to the week of April 1 or April 8. (R. 1924, 1930).

tended the trial date. (R. 2225-28). In denying the motion, the court said:

> "While I think it would be permissible to grant defendant's motion to dismiss as a matter of discretion, I do not grant it at this time, but I can not imagine on a similar circumstance if such a motion is made for any subsequent breach of the pretrial schedule that plaintiffs would be able to successfully defend against a motion to dismiss." (R. 2224-25).

7. On March 18, 1974, M-GB filed its answers to the interrogatories. At a pretrial session the next day, when defendants attacked the sufficiency of the answers, the court set a time schedule for a motion to compel supplemental answers. (R. 2357-58). This schedule was adhered to, but not without another *ex parte* approach to the court by M-GB for an extension of time, this time by telephone rather than by letter. At oral argument, the court again warned M-GB about its repeated failure to meet deadlines established by the court, stating: ". . . I just hope that it will not happen again because you are at the precipice." (R. 2418).

M-GB's answers to the crucial questions relating to its financial structure were essentially that it lacked the information.[6] (R. 2382-83). Depositions of Metropolitan's officers had revealed substantially no finan-

[6] M-GB claimed it needed access to some of its documents in the hands of others. Judge Higginbotham's offer to order immediate return of any necessary M-GB papers being retained by Mr. Kohn was not taken up. (R. 2401). As to M-GB's claim that some of its papers were in the hands of the WHA or various lawyers or accountants who were owed money, M-GB admitted it had made no efforts to obtain the papers. (R. 2425).

cial information.[7] M-GB counsel built a wall against any probing by instructing the witnesses not to answer, on the asserted ground that such information was only attainable through interrogatories. (R. 2143-46, 2157-58). Yet, the answers to the interrogatories, as we have shown, far from supplying the information, simply built a moat around the wall of silence.

8. On April 12, 1974,[8] the court issued its order requiring M-GB to file supplemental answers. It fixed three due dates: for most of the answers, April 29; for some, as to which M-GB claimed it could not answer without further discovery, not later than July 25; for those relating to damages, not later than June 14. (R. 2483-85). As to the answers due June 14, the court declared in its order:

> "In this regard the plaintiffs are forewarned that the Court will be amenable to entertaining any motions under Fed. R. Civ. P. 37 should such information not be forthcoming by June 14, 1974."[9] (R. 2489-90).

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[7] The only information Metropolitan's officers supplied about its finances was that the original paid-in capital was $25,000. They professed not even to know whether the company was on a cash or accrual basis or on a calendar or fiscal year. (R. 2414-15).

[8] By that time the court, in response to M-GB's urgings, had already re-set the trial date for September 16, 1974. (R. 2352-55).

[9] In a colloquy with the court on March 25, 1974, M-GB counsel had suggested June 15, 1974 as an outside date beyond which, if M-GB for any reason failed to produce the damage information, the court would be justified in ordering a preclusion of M-GB's proof of damages. (R. 2426). Since June 15 fell on a Saturday, the court fixed the date as June 14.

9. The April 29 due date was extended, over defendants' objections, to May 6, 1974,[10] and on that date M-GB filed its first group of supplemental answers, including five of the fifty or so due not later than June 14. As for the rest of those fifty interrogatories, June 14 came and went without a word from M-GB. Nor, when it had been brought to M-GB's notice that the defendants would again move for a Rule 37 dismissal (R. 2933), did M-GB belatedly file the required answers. Instead, they waited until June 19 and then, the same day that the defendants moved to dismiss the complaint, M-GB moved for an extension of time until July 25, 1974, which, as the district court pointed out, would be ten days *after* the termination of all discovery and would thus deprive the defendants of any opportunity to question M-GB about the information produced. (R. 2727, 2732, 2442). The court denied the motion for extension and, on July 3, 1974, granted the motion to dismiss.

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[10] For its supplemental answers due April 29, M-GB claimed that it needed documents from the file of the district court. When M-GB had needed court documents for its case in chief, it had obtained them in time. See Appendix to brief for Defendants-Appellees below. If M-GB really needed to reproduce court documents in order to answer these interrogatories, it had known of that need since February 26, 1974, when it undertook to answer them and when it learned it would not have access to Mr. Kohn's files without a $50,000 payment on its fee obligation. App. G, p. 180a. Yet, it waited until April 17, 1974 before ordering the clerk to reproduce the hundreds of documents it said it needed to satisfy its discovery obligations; and so, on April 24, by still another letter to the court, M-GB sought an extension of the April 29 due date because the clerk could not reproduce all the copies in time. (R. 2503, 2530-31). The court, once more yielding to the necessity produced by M-GB's cavalier attitude toward its obligations, extended the April 29 date to May 6, 1974. (R. 2532).

10. In granting the motion to dismiss on the above-recited facts, Judge Higginbotham stated:

> "Courts today do not condone the 'surprise' approach to discovery whereby at the latest possible moment the parties reveal the substance of their cases. If the discovery process is abused or allowed to be frustrated by the parties, then the entire pretrial procedures and the discovery provisions of the Federal Rules of Civil Procedure can be turned into a mockery. Time deadlines are imposed for valid reasons and there are prescribed procedures by which the time periods can be enlarged *if done in a timely fashion.* An underlying factor here is that a Court must be able to regulate and control in an orderly fashion the progress of discovery. Plaintiffs' counsel in the instant case are not inexperienced and just out of law school. Instead they are seasoned attorneys who know and comprehend the intricacies of federal practice and the importance of discovery in protracted litigation. Sanctions become meaningless unless they are applied when the circumstances demand them, though harsh they may be. After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.*, June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action

> was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." App. E, pp. 50a-51a.

The Reversal of the Dismissal Order

In order to conclude, as it did, that the district court had abused its discretion in dismissing the complaint, the Third Circuit had to take two steps:

> (1) As to all of M-GB's pre-February 19, 1974 discovery violations (as detailed in numbered paragraphs 1 through 3, *supra*), the court held it error to consider them. App. A, p. 12a.
>
> (2) As to the June 14 violation, which the court called "the crucial facts", it held that there was no discretion to dismiss except for an "intentional" violation and then proceeded to find, in contradiction to the record, that the violation had not been intentional.[11] App. A, pp. 12a, 16a.

In limiting the scope of permissible consideration to M-GB's post-February 19, 1974 violations, the Third Circuit recognized that normally "the full record should be considered. *Diapulse Corp.* v. *Curtis Publishing,* 374 F.2d 442 (2d Cir. 1967)." It held, however, that several mitigating factors in this case justified sweeping a year of violations under the rug.

The first of these purportedly mitigating factors was that for eight months or so before Golenbock &

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[11] A third step, taken *sub silentio,* was essentially to ignore all of M-GB's violations between February 19 and June 14, 1974. See numbered paragraphs 5 through 8, *supra.*

Barell took over as trial counsel, the defendants appeared not to be pressing for discovery. App. A, p. 13a. The apparent implication is that the district court should have treated discovery as a fresh problem in February 1974. What the Third Circuit seemed not to be aware of, however, and what the trial court of course did know (see numbered paragraph 5, *supra*) was that counsel for M-GB had already agreed, in June of 1973, to supply the information the defendants sought, so that there was no occasion to press the issue until M-GB's new lawyers ignored their obligation.

The second point of purported mitigation was that before February 19, 1974, M-GB had been represented by Mr. Kohn and the "delays or deficiencies in the answers caused by Kohn should not be attributed to M-GB's present counsel." As already shown, however, the "deficiencies" were, in fact as well as in law, the responsibility of M-GB, whether or not they were attributable to Golenbock & Barell.[12]

A third purportedly mitigating factor was the district court's lien decision which required M-GB to pay $50,000 if it wished to obtain Mr. Kohn's files. App. G, p. 180a. The consequence of that decision, according to the Third Circuit, was to make M-GB dependent upon reproduction of documents from the court file. The correctness of the lien decision was not questioned by the Third Circuit. It seemed, however, to feel that an outlay of $50,000 in pursuit of a $9 million antitrust claim was somehow inordinate. It altogether ignored, moreover, M-GB's quick and easy access to the court records in aid of its own case and its apparent en-

[12] See n. 4 and text thereat.

countering of difficulties only when it needed documents to satisfy its discovery obligations. See n. 10, *supra*.

The final purportedly mitigating factor was the Third Circuit's finding that Golenbock & Barell, when it commited itself on February 26, 1974, to answer the interrogatories by March 11, had not yet even seen them. There had been no occasion for the district court to make a finding on whether counsel had seen the interrogatories before the commitment to answer them, because the fact was not in issue. Mr. Wagman of Golenbock & Barell had stated in open court that back in 1973 the "firm had the interrogatories and in the capacity as general counsel to [M-GB] we were asked by lead counsel [Mr. Kohn] to prepare answers to certain of the interrogatories." (R. 2204-05). Even assuming it is proper for the reviewing court to make findings of its own, the Third Circuit's finding that Golenbock & Barrel had *not* seen the interrogatories is thus blatantly contradicted by the record.

As to the "crucial" June 14, 1974 violation, the Third Circuit found that it was the result of a "clerical error" by Golenbock & Barell's managing clerk. App. A, pp. 15a-16a. This finding as well had no evidentiary support and started out in the court's opinion as only an appellate *contention* by M-GB. App. A, p. 9a. The purported "clerical error" was the managing clerk's alleged omission of the June 14 date in preparing his schedule of calendar dates. The record shows that M-GB counsel claimed to have discovered that error on June 15. (R. 2993, 3140). Therefore, even if there was such an error, it was not the cause of the June 14 violation, for had it been, M-GB

would surely have mentioned it as the cause of their violation when on June 17 they sought defendants' consent to an extension of time, or when on June 19 they moved for an extension, or when on June 24 they responded to the motion to dismiss, or when on June 26 that motion was orally argued. Instead, their position was that the failure to comply with the June 14 deadline was "solely because of the inability to obtain the necessary information. . . ." (R. 2811).

Only in an affidavit in support of a motion for reconsideration on July 15, twelve days after the complaint had been dismissed, did M-GB counsel come up with the afterthought of the "clerical error". (R. 2993). Even then, moreover, M-GB did not proffer the answers to the interrogatories, thus further justifying the dismissal. See *Diapulse Corp.* v. *Curtis Publishing Co.,* 374 F.2d 442, 447 (2d Cir. 1967). The circumstances thus clearly supported Judge Higginbotham's conclusion, in denying reconsideration, that "the original Order of Dismissal was totally appropriate, required and justified." (R. 478-79).

REASONS FOR GRANTING THE WRIT

1. Only once since the adoption of the Federal Rules of Civil Procedure in 1938 has this Court undertaken to construe Rule 37. The Court held, in *Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958), that the rule does not authorize dismissal of a complaint for a party's noncompliance with a discovery order where that noncompliance was "due to inability, and not to willfulness, bad faith, or any fault of" the party. The "inability" that protected the party against dismissal was narrowly defined as "inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211. The Court did not define the type or degree of "willfulness, bad faith . . . or fault" which would justify dismissal. However, by its dictum in *Link* v. *Wabash R.R.,* 370 U.S. 626, 636 (1962), dealing with the analogous problem of dismissal under Rule 41(b), the Court indicated that the dismissal sanction is not reserved only for those parties who openly flout the authority of the court and avow their own contumacy. Noncompliance which is "a product of neglect", the Court said in *Link,* may warrant dismissal of the complaint.

The Third Circuit in the instant case, while purporting to apply this Court's *Rogers* test, restated it to require, for a dismissal, that the noncompliance be "willful, conscious and intentional." App. A, p. 12a. On its assumption that M-GB's noncompliance with the June 14, 1974 deadline was the product of a "clerical error" by the firm's managing clerk (an assumption contradicted by the evidence), the Third Circuit was then able to hold that the dismissal of the complaint violated the *Rogers* test and was, therefore, an abuse of discretion.

The *Rogers* situation, where an external force actually prevents the party from complying, is comparatively rare. Even rarer is the case where the party announces an intentional refusal to comply. The vast majority of cases must be expected to fall within *Link's* "product of neglect" category. Even assuming that it was, indeed, the so-called "clerical error" that caused the noncompliance here, this case hardly fits within the *Rogers* description of "circumstances [not] within [M-GB's] control"; and it does fit precisely within the *Link* description of noncompliance "produced by neglect". Unless reviewed by this Court,

therefore, the Third Circuit's holding may well spell the demise of the dismissal sanction as an indispensable component of the carefully constructed discovery rules.

2. This case presents for the first time the question whether the scope of review of a Rule 37 dismissal is broad enough to permit the reviewing court to make findings of its own. As we have shown, the Third Circuit excused much of M-GB's pre-June 14, 1974 noncompliance on *an appellate finding* that its counsel, when he made the commitment on February 26, 1974, to answer the interrogatories by March 11, 1974, had not even seen them. As for the June 14, 1974 noncompliance, the court made *an appellate finding* that it resulted from a "clerical error". While neither of these findings is supported by the record and, indeed, both clearly contradict the evidence, we do not suggest that it is appropriate for this Court to review such factual issues on certiorari. We do, however, submit that it is highly appropriate for this Court to review the question whether the courts of appeals have any power at all to make findings of their own in their review of district court actions under Rule 37.

Professor Rosenberg, whose article [13] played so large a role in the 1970 revision of Rule 37,[14] concluded his section on "Flaws in the Courts' Administration of Rule 37" with the observation:

> "Rules, no matter how well conceived, will not enforce themselves. They will work only if judges

[13] Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 496 (1958).

[14] See Advisory Committee Note of 1970 to Amended Rule 37, 4A Moore, *Federal Practice*, § 37.01[8].

> confronted with the task have unwavering determination to make them work. There is a vital difference between a discretionary melioration of sanctions in response to mitigating circumstances, which is proper, and nullification of the rule because of antipathy for its ends or means, which is not. Due enforcement of this rule should not be sabotaged by judicial pernicketiness about its involving 'merely' procedural matters. Its purpose is too important to permit casual disregard." [15]

In light of these observations, it is eminently sensible that the decision whether or not to dismiss a complaint for noncompliance with a discovery order be left to the sound discretion of the district court, especially in a complex case such as this in which that court has lived through a long history of recalcitrance toward discovery and has repeatedly granted postponements and issued admonitions. The courts of appeals must, to be sure, be afforded jurisdiction to review a dismissal order, but the scope of that review has always been assumed to be "extremely narrow, confined solely to whether the trial court has abused its discretion," and only "clear" abuse of discretion has been assumed to justify a reversal. *Marshall* v. *Sielaff*, 492 F.2d 917, 918 (3rd Cir. 1974); *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F.2d 677, 680 (3rd Cir. 1970); *Kenney* v. *California Tanker Co.*, 381 F.2d 775, 778 (3rd Cir. 1967).

3. In deciding whether the plaintiffs' noncompliance with the discovery order may be attributable to "willfulness, bad faith, or . . . fault", so as to permit a dismissal of the complaint under *Societe Interna-*

[15] See, in general accord, 1959 Duke L. J. 278, 291.

tionale v. *Rogers,* it should be proper, if not indispensable, that the district court take into consideration the antecedent procedural history of the case.[16] By its holding that it was an abuse of discretion for the district court to consider that antecedent procedural history in the instant case, the Third Circuit has eliminated from consideration the only material which in most cases would be available for making the determination this Court has required. Unless the plaintiff, at the time of noncompliance with the order, should actually verbalize his defiance of the court, "willfulness, bad faith, or . . . fault" would be impossible to establish except by reference to the record of his accumulated discovery violations and his callousness to the court's repeated admonitions.

If one of the purposes of the 1970 revision of Rule 37 was "to encourage more frequent imposition of sanctions in cases in which there has been an abuse of the discovery rules",[17] this Court should review the judgment below and reinforce the authority of the district courts.

4. In substantial part, as we have shown, the decision below was based upon a conclusion that M-GB, having replaced its record counsel in February 1974, had cleansed itself of any taint resulting from the deficiencies of its conduct over the preceding year. The Third Circuit's conclusion in that respect was in ac-

[16] In affirming the Rule 41(b) dismissal in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962), this Court said:

> "And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation . . ., that petitioner had been deliberately proceeding in dilatory fashion."

[17] 8 Wright, *Federal Practice & Procedure* 756.

cord with those Rule 37 cases before the 1970 revision which used the lawyer-client distinction as a device for nullifying the rule.[18] When a similar argument was offered against a Rule 41(b) dismissal, this Court, in *Link* v. *Wabash R.R.*, 370 U.S. at 633-34, gave it short shrift:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. . . ."

See also *Spering* v. *Texas Butadiene & Chemical Corp.*, 434 F.2d at 680, relying on *Link* and noting that:

> "Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable."[19]

[18] See 1959 Duke L. J. 278, 291:

> "It is undeniable that the framers of the Rules contemplated that rule 37 should be an instrument of drastic action against those who would thwart the discovery process. The tendency, however, has been to withhold serious sanctions in return for promises by the recusant to comply at some future time. The reluctance to mete out the full measure of punishment that the circumstances might require is, in the main, attributable to hesitancy to harm an innocent litigant who might be victimized by the errors of his attorney, or to the hope that the suit might eventually be resolved on the merits, conditioned upon future compliance.
>
> "What is the net result of this diluted judicial application? The principal result is that rule 37 has been relegated too often to the station of 'merely another procedural technicality,' to be lived with or tolerated, rather than respected and observed."

[19] In this case, as shown *supra* p. 4 and n. 4 the officers and shareholders of Metropolitan, one of the corporate components of

Rare, indeed, is the violation of a discovery order for which responsibility cannot be placed upon the lawyer rather than the client. If, therefore, Rule 37 is to serve the purpose for which it was designed, this Court should review the judgment below and reaffirm the principle it settled as to Rule 41(b) in *Link*.

5. The four factors discussed above as relevant to the determination whether discovery misconduct should lead to dismissal—*i.e.*, the party's grossly negligent response to court orders, the total record of his discovery behavior, his responsibility for the conduct of his counsel, and the degree of the authority of the trial court as compared to a reviewing court—all combine to comprise a fifth and, we submit, most persuasive reason for granting the writ here sought.

Judge Higginbotham pointed out, in dismissing M-GB's complaint:

> "An underlying factor here is that a Court must be able to regulate and control in an orderly fashion the progress of discovery. . . . Sanctions become meaningless unless they are applied when circumstances demand them, though harsh they may be." App. E, p. 50a.

The court of appeals failed to recognize the obvious validity of these propositions. On the contrary, it dictated to trial judges that their discretion to impose the sanction of dismissal is so narrowly circumscribed as to be virtually non-existent. That message is not likely to be lost on such litigants as M-GB who derive advantage from usurping control of the pretrial sched-

M-GB, are practicing lawyers, and Golenbock & Barell is itself a stockholder of Golden Blades, the other corporate component, and one of the firm's partners is an officer and member of the board and executive committee of that corporation.

ule.[20] The court of appeals opinion, if permitted to stand, will undermine the power of trial judges to control the discovery process and will encourage abuses of that process by litigants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for all Petitioners except National Hockey League

HARRY L. SHNIDERMAN
BINGHAM B. LEVERICH
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000
Attorneys for Petitioner National Hockey League

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[20] Because of M-GB's tactics here, the court had already been forced to extend the "firm" trial date three times. (R. 1924, 1930, 2225-28, 2352-55). If, instead of dismissing the complaint, the court had again extended the deadline for answering the damage interrogatories, it would also have been forced to extend the trial date a fourth time. (R. 466, 474, 2442).